Supreme Court, U.S.
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No. 02-1350

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT SALT LAKE CITY CORPORATION IN SUPPORT OF PETITIONER

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Pursuant to S. Ct. Rule 12.6, the City respectfully submits this response in support of the LDS Church's petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit.

The City, as defendant below, sold the parcel of real property that is the subject of this litigation, to the LDS Church, and reserved unto itself an easement for the singular purpose of "pedestrian access and passage only." Pet. App. 87a. The deed of conveyance further provided that the "Property is and shall at all times remain the private property of [the LDS Church]" and that the easement was not intended "to create or constitute a public forum, limited or otherwise." *Id.* at 88a and 89a.

Consistent with the clear intent of the parties, the district court ruled favorably upon the City's and Petitioner's arguments and entered judgment accordingly. *Id.* at 74a. Upon review, the Circuit Court found that the easement was a "constitutionally cognizable property interest" that is "subject to forum analysis." *Id.* at 11a and 12a. At the conclusion of its forum analysis, the Circuit Court held that the LDS Church's property was burdened by the City's easement. *Id.* at 12a. Based thereon, the Circuit Court found that the easement had many of the characteristics of a public sidewalk and, accordingly, the easement created a public forum upon the LDS Church's private property. *Id.* at 28a. Additionally, the Circuit Court held that certain Deed restrictions could not be sustained in light of the Plaintiffs' First Amendment claims. *Id.* at 30a-31a. The Circuit Court reversed and remanded for the entry of judgment in favor of Plaintiffs below. *Id.* at 32a.

The questions presented by the LDS Church raise substantive issues that affect local governments throughout the United States. The conflicts between the various courts have a profound chilling effect upon the reasonable ability of local government to manage and dispose of public property. The private sector, given the Tenth Circuit Court's decision, will be understandably reluctant to purchase from or partner with local government for the development of public resources. Local government must have the ability to dispose of property that no longer meets the needs of the public so that it will have the resources to develop that infrastructure that meets those needs. The Tenth Circuit Court's decision does not permit the flexibility that is implicit in the decisions of the Second Circuit Court and the Nevada Supreme Court.

Furthermore, the Tenth Circuit's decision creates an untenable likelihood of compelling the LDS Church and the City to interact in a manner that raises the spectre of an Establishment Clause violation – the very issue that these parties attempted to avoid.[1]

Consideration by this Court is necessary to the final resolution and clarification of these significant, but conflicted, issues. In order for local government, specifically the City, to understand the proper tension between its role as a governmental landowner and the First Amendment, the City respectfully requests that this Court grant the pending Petition and enunciate a clear and functional statement in response to the questions presented.

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1. The District Court found in the City's and the LDS Church's favor on the Establishment issue under the original arrangement. The Circuit Court declined to address the issue and the other Respondents did not cross-petition on that issue.

CONCLUSION

The City respectfully requests that the Court issue a Writ of Certiorari to review the decision and judgment of the United States Circuit Court for the Tenth Circuit.

Respectfully submitted,

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